

FISH & RICHARDSON P.C.

Katherine K. Lutton  
(CSB No. 194971 / lutton@fr.com)  
Enrique Duarte  
(CSB No. 247523 / duarte@fr.com)  
500 Arguello Street, Suite 500  
Redwood City, CA 94063  
Tel: (650) 839-5070 Fax: (650) 839-5071

Ruffin B. Cordell (*pro hac vice*)  
cordell@fr.com  
1425 K Street, NW, Suite 1100  
Washington, DC 20005  
Tel: (207) 783-5070 Fax: (207) 783-2331

Christopher O. Green (*pro hac vice*)  
cgreen@fr.com  
Aamir A. Kazi (*pro hac vice*)  
kazi@fr.com  
Jacqueline Tio (*pro hac vice*)  
tio@fr.com  
1180 Peachtree Street, 21<sup>st</sup> Floor  
Atlanta, GA 30309  
Tel: (404) 892-5005 Fax: (404) 892-5002

Benjamin C. Elacqua (*pro hac vice*)  
elacqua@fr.com  
1221 McKinney Street, Suite 2800  
Houston, TX 77010  
Tel: (713) 654-5300 Fax: (713) 652-0109

WILMER CUTLER PICKERING HALE AND  
DORR LLP

Joseph J. Mueller (*pro hac vice*)  
joseph.mueller@wilmerhale.com  
60 State Street  
Boston, MA 02109  
Tel: (617) 526-6000 Fax: (617) 526-5000

Matthew Hawkinson  
(CSB No. 248216  
matthew.hawkinson@wilmerhale.com)  
350 South Grand Avenue, Suite 2100  
Los Angeles, California 90071  
Tel: (213) 443-5300 Fax: (213) 443-5400

Mark D. Selwyn  
(CSB No. 244180  
mark.selwyn@wilmerhale.com)  
950 Page Mill Road  
Palo Alto, CA 94304  
Tel: (650) 858-6000 Fax: (650) 858-6100

Attorneys for Defendant APPLE INC.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
(SAN JOSE DIVISION)

GPNE, CORP.

Plaintiff,

v.

APPLE INC.,

Defendant.

Case No. 5:12-cv-02885-LHK

**APPLE INC.'S DAUBERT MOTION TO  
EXCLUDE TESTIMONY OF MICHAEL J.  
DANSKY**

**HEARING REQUESTED**

Date: June 26, 2014  
Time: 12:00 p.m.  
Place: Courtroom 8, 4th Floor  
Judge: Hon. Lucy H. Koh

**NOTICE OF MOTION**

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 26, 2014, or soon thereafter as the matter may be heard in the United States District Court for the Northern District of California, Apple Inc. (“Apple”) respectfully requests this Court to hear Apple’s *Daubert* motion to exclude the testimony and damages opinion of Michael J. Dansky. Apple’s motion is based on this Notice of Motion, Motion to Exclude, and the supporting declaration of Benjamin C. Elacqua filed herewith; and such evidence and argument as may properly be presented at the hearing on this matter.

**STATEMENT OF RELIEF TO BE REQUESTED**

Apple moves for an order excluding two sets of opinions of GPNE’s damages expert Michael J. Dansky from trial pursuant to Federal Rule of Evidence 702, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and Federal Rule of Evidence 403.

**I. INTRODUCTION**

Like the excluded opinions from his initial report, the new opinions contained in Mr. Dansky’s supplemental report are legally and factually deficient. Apple reserves its right to challenge all of Mr. Dansky’s opinions as this case proceeds (*e.g.*, in JMOL briefing), but Apple limits its present *Daubert* challenge to two issues.<sup>1</sup> First, Mr. Dansky’s opinion on alleged convoyed sales does not meet the methodological standards of *Daubert* because Mr. Dansky failed—as he concedes—to analyze the link (if any) between the patents-in-suit and the alleged convoyed sales. Second, Mr. Dansky’s “Alternative Calculation” of the smallest saleable patent-practicing unit (“SSPPU”) conflicts—as he concedes—with the Court’s April 16, 2014 Order holding that the SSPPU is the baseband processor. Apple respectfully requests that the Court preclude Mr. Dansky from offering these two sets of opinions at trial.

---

<sup>1</sup> Apple previously moved to exclude the opinions and testimony of Mr. Dansky on the basis of Mr. Dansky’s failure to use the baseband processor as the appropriate royalty base. (Dkt. Nos. 183, 223.) The Court held that the baseband processor was the smallest saleable patent-practicing unit but permitted Mr. Dansky to use an alternative royalty base (other than the smallest saleable patent-practicing unit). Apple will not reargue that point now, but reserves its appellate rights as to its position that Mr. Dansky methodologically was required to use the smallest saleable unit (the baseband processor) as the royalty base in his analysis.

1 **II. STATEMENT OF THE ISSUE TO BE DECIDED**

2 1. Whether the Court should exclude the testimony and opinion of Mr. Dansky  
3 regarding (a) alleged convoyed sales and (b) his “alternative” SSPPU calculation.

4 **III. STATEMENT OF RELEVANT FACTS**

5 On April 3, 2014, the Court granted Apple’s motion to exclude the opinion and testimony  
6 of Mr. Dansky, but allowed him a supplemental report to correct the methodological flaws present  
7 in his initial report. Dkt. No. 231. Mr. Dansky’s supplemental report addresses a range of issues,  
8 two of which are challenged by this motion. First, in a “convoyed sales” section of his  
9 supplemental report, Mr. Dansky identifies “follow on sales for the accused products” to include  
10 iTunes, App Store, AppleCare warranty and service revenue, and purchase of additional Apple  
11 devices. (Ex. A, Dansky Supp. Report at 15.) He then “calculate[]s an amount for a portion of the  
12 convoyed sales value derived by Apple from its customers’ demand for *ubiquitous data access*.”  
13 (*Id.* at 16, 24 (emphasis added).) However, Mr. Dansky failed to isolate the particular relationship  
14 between the patents-in-suit and “demand for ubiquitous data access”—nor the convoyed sales  
15 allegedly dependent on ubiquitous data access:

16 Q. *My question is have you attempted to isolate the fraction of the data*  
17 *transfer process that GPNE actually claims to own as distinct from*  
*everything else?*

18 A. *No.*  
19 ...

20 Q. But again, *you, in your calculation, did not try to numerically isolate the*  
*convoyed sale value of the patents-in-suit specifically*, correct?

21 A. No. I think theoretically I could have used sort of a patent counting  
22 method or one of the methods that we -- we use to try to isolate that  
amount, but *I did not do that*.

23 (*Id.* at 60:2-6, 61:18-25; *see also* 56:14-21 (agreeing GPNE did not invent data access).)

24 Second, Mr. Dansky’s supplemental report contains an “Alternative Calculation”  
25 that acknowledges the Court’s holding that the baseband processor is the smallest  
26 saleable unit, but nonetheless presents “a calculation based on an alternative position on  
27 the appropriate SSPPU.” (Ex. A at 25-27.) At his deposition, Mr. Dansky admitted that  
28 his alternative calculation deviates from the Court’s Order on this issue:

1 Q. But you would agree *your opinion, as set out on Pages 25 and Page 27 in*  
 2 *this report, is inconsistent with what the court concluded as to the*  
 3 *smallest saleable patent practicing unit?*

4 A. *It's a different view of what the smallest saleable practicing -- the*  
 5 *smallest saleable patent practicing unit is*, but it -- it's a view, and the  
 6 judge can consider that if she would like or she can -- she cannot.

7 Q. Again, to be clear, *it's different than what the judge concluded?*

8 A. *Yes.*

9 (Ex. B at 103:2-13.)

#### 10 **IV. ARGUMENT**

11 Two opinions presented in Mr. Dansky's supplemental report should be excluded.

12 First, Mr. Dansky's "convoyed sales" opinions are legally insufficient and amount to an  
 13 improper attempt to introduce evidence of Apple's larger revenues under the guise of alleged  
 14 "follow-on sales" of the accused products.<sup>2</sup> Mr. Dansky's approach is legally incorrect because he  
 15 failed to isolate the convoyed sales value of the patents-in-suit or sufficiently analyze the link (if  
 16 any) between the patents-in-suit and the alleged convoyed sales. *See Rite-Hite Corp. v. Kelly Co.*,  
 17 56 F.3d 1538, 1550 (Fed. Cir. 1995) ("Our precedent has not extended liability to include items  
 18 that have essentially no functional relationship to the *patented invention* and that may have been  
 19 sold with an infringing device only as a matter of convenience or business advantage.") (emphasis  
 20 added). Mr. Dansky did not analyze which "convoyed sales"—if any—were driven by the tiny  
 21 fraction of GPRS/EDGE and LTE that GPNE accuses. Mr. Dansky did not even analyze which  
 22 "convoyed sales" occurred on cellular networks as opposed to (highly popular) Wi-Fi networks.

23 Second, Mr. Dansky's "alternative" SSPPU calculation is contrary to the Court's holding  
 24 that the baseband processor is the smallest saleable patent-practicing unit in this action (Dkt. No.  
 25 242 at 24-25) and should also be excluded under *Daubert* and Rule 403.

26 Apple thus respectfully requests that the Court exclude the "convoyed sales" and SSPPU  
 27 opinions of Michael J. Dansky.

28 <sup>2</sup> Mr. Dansky previously conceded that GPNE's patents do not drive demand for Apple's products.  
 (Ex. C, Feb. 21, 2014 Dansky Dep. Tr. at 127:8-18.)

1 Dated: May 29, 2014

FISH & RICHARDSON P.C.

2 By: /s/ Benjamin C. Elacqua

3 Benjamin C. Elacqua

4 Attorneys for Defendant

5 APPLE INC.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on May 29, 2014, all counsel of record who are deemed to have consented to electronic service are being served with a copy of **APPLE INC.'S DAUBERT MOTION TO EXCLUDE TESTIMONY OF MICHAEL J. DANSKY** via the Court's CM/ECF system.

By: /s/ Benjamin C. Elacqua  
Benjamin C. Elacqua